Supreme Court, U.S.
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No. 95-798

In The

Supreme Court of the United States

October Term 1995

GLENN R. WAITE,
Personal Representative of the Estate of
Harriet I. Waite, deceased,

Petitioner,

v.

W. SCOTT CARPENTER, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nebraska
And The Court Of Appeals Of The State Of Nebraska

BRIEF OF RESPONDENTS W. SCOTT CARPENTER, M.D., SCOTTSBLUFF INTERNAL MEDICINE GROUP, ARMANDO J. MANGANA, M.D., WILLIAM M. PACKARD, M.D., TERRY MARK HIMES, D.O. AND LARRY O'HOLLERAN, M.D. IN OPPOSITION

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QUESTIONS PRESENTED

Respondents restate the Questions Presented as follows:

Has Petitioner, Glenn R. Waite, Personal Representative for the Estate of Harriet I. Waite, deceased, raised a federal question in the underlying proceedings in the Nebraska court system so as to grant this Court jurisdiction pursuant to 28 U.S.C. § 1257 or 28 U.S.C. § 1651?

LIST OF PARTIES

Petitioner's list of parties to the proceedings is acceptable with the exception that the Petitioner in the underlying proceedings was "Glenn R. Waite, Personal Representative for the Estate of Harriet I. Waite, deceased" and *not* "Glenn R. Waite" as denominated in Petitioner's Petition for Writ of Certiorari [App. of Petitioner 22, 25-32, 76, 77].

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TO THE HONORABLE SUPREME COURT:

Respondents, W. Scott Carpenter, M.D., Scottsbluff Internal Medicine Group, Armando J. Mangana, M.D., William M. Packard, M.D., Terry Mark Himes, D.O. and Larry O'Holleran, M.D., respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Glenn R. Waite, Personal Representative of the Estate of Harriet I. Waite, deceased.

OPINIONS BELOW

The two subject opinions of the Nebraska Court of Appeals, appearing at pps. 22-25 (*Waite II*) and 32-45 (*Waite I*) of Petitioner's appendix, respectively, are cited as follows:

Waite v. Carpenter, 3 Neb. App. 879, 533 N.W.2d 917 (Neb. App. 1995) (*Waite II*); and

Waite v. Carpenter, 1 Neb. App. 321, 496 N.W.2d 1 (Neb. App. 1992) (*Waite I*).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257 and 28 U.S.C. § 1651. It is important to note that 28 U.S.C. § 1651 is not a jurisdictional statute, but instead is a procedural statute dealing with writs. Section 1651 does not effect the jurisdiction of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 provides, in part, as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Respondents would defer to the well-written and concise summaries of the case as memorialized by the Nebraska Court of Appeals as found in its opinions cited above and found in the appendix of Petitioner as pps. 22-25 (*Waite II*) and 32-45 (*Waite I*).

SUMMARY OF THE ARGUMENT

Petitioner does not raise sufficient grounds under 28 U.S.C. § 1257 for seeking review by the United States Supreme Court of the decisions of the Supreme Court of

the State of Nebraska and the Court of Appeals of the State of Nebraska in this matter. Petitioner is thereby precluded from raising these issues at this late date. Because of Petitioner's failure to raise a federal question below, this Court lacks jurisdiction to accept Petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO RAISE A FEDERAL QUESTION FOR REVIEW BY THIS COURT.

The jurisdiction of the United States Supreme Court to review a state court decision under 28 U.S.C. § 1257 is dependent upon the presence of a federal question in the case. *St. Louis M.I. and S.R. Co. v. Taylor*, 210 U.S. 281 (1908). The reason for the federal question requirement is that the United States Supreme Court is not a court of general jurisdiction which can correct any error in state court proceedings; its powers are limited to correcting denials of federal rights in specific instances. *Warters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

In order to obtain review of a state court decision in the United States Supreme Court, pursuant to 28 U.S.C. § 1257, it must affirmatively appear from the record as a whole, either expressly or by clear implication, that the federal claim was adequately presented to the state court and was passed upon by that court. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392 (1981); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L.Ed.2d 474 (1987). Accordingly, when reviewing state court decisions, the United States Supreme Court will not

decide federal claims that were not pressed or passed upon below. *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983); *Heath v. Alabama*, 474 U.S. 82, 88 L.Ed.2d 387 (1985); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62 (1988). Moreover, if nothing in the record indicates that a federal question was presented to the state court, the United States Supreme Court will not take judicial notice that a federal question might have been involved in the case. *Yazoo and M.R. Company v. Adams*, 180 U.S. 481, 45 L.Ed.2d 415 (1901).

Although Petitioner goes to great lengths in his Petition to explain how he believes the Nebraska courts violated his federal rights, the appendix submitted by Petitioner is all but silent in citing underlying pleadings or opinions indicating that Petitioner raised these federal questions in the state court proceedings below. The *only* reference in any of the documents submitted or filed by Petitioner in the state court matters included in Petitioner's appendix even remotely raising an arguable federal question is Petitioner's Objection to Respondents' Motion for Summary Affirmance [App. of Petitioner 81]. It is important to note that Petitioner was raising this argument in response to Respondents' request that the Nebraska Court of Appeal summarily affirm *Waite II* in view of its opinion from *Waite I* [App. of Petitioner 77]. That request by Respondents was overruled [App. of Petitioner 28-31] and, consequently, any "violation . . . of [Petitioner's] rights" under federal law in regards to this narrow issue of summary affirmance was decided in Petitioner's favor.

Secondly, if the Court will note Petitioner's statement of the case at page 9 of Petitioner's Petition for Writ of

Certiorari, Petitioner himself indicates that he did not directly raise a federal question in the state court proceedings; likewise Petitioner therein admits that the only reference to a possible federal question raised by Petitioner can solely be found in Petitioner's appendix at page 81 (discussed in the preceding paragraph by Respondents).

Clearly Petitioner did not raise any federal questions to the Nebraska state courts. Likewise, the record as submitted by Petitioner is woefully lacking in documented proof of Petitioner arguably raising a federal issue below. Petitioner's bare bones statements citing to his briefs are insufficient to show that Petitioner adequately preserved his rights to access this Court. In fact, the most important piece of evidence indicating that Petitioner *did not* attempt to raise any federal questions in the most recent of the Nebraska Court of Appeals decisions (*Waite II*) is Petitioner's Issues on Appeal filed in conjunction with Petitioner's second appeal (*Waite II*) [App. of Respondents 1-3]. Clearly the issues raised for the second appeal by Petitioner to the Nebraska Court of Appeals do not in any way, shape or form contemplate a federal question for review.

There are powerful policy considerations underlying the requirement that the federal question be first presented to and ruled on by the state courts. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392 (1981). These policies are first, comity to the states, and second, a host of practical considerations, chief among which is the United States Supreme Court's need for a properly developed record on appeal. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392 (1981); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 100

L.Ed.2d 62 (1988). Clearly there is no record on appeal, let alone one presented to this Court, that would support Petitioner's contention that he properly raised a federal question in the state court proceedings.

Because the United States Supreme Court will not decide federal claims that were not pressed or passed upon below, it is essential that a federal question be brought to the attention of the state court hearing the case. *Green Bay and Mississippi Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 43 L.Ed. 364, rehearing denied, 173 U.S. 179, 43 L.Ed. 658 (1898). The record filed with the United States Supreme Court must show that the federal questions were raised in the state courts. *Live Oak Water Users' Association v. Railroad Commission of California*, 264 U.S. 354, 70 L.Ed. 305 (1926); *Whitney v. California*, 274 U.S. 357, 71 L.Ed. 1095 (1927); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62 (1988). Petitioner has not complied with this requirement.

As far as federal law is concerned, it is not important how the federal question was raised in the state court, as long as it appears that such question was actually considered and decided by the state court. *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 58 L.Ed. 1254 (1914); *Cissna v. Tennessee*, 246 U.S. 289, 62 L.Ed. 720 (1918); *Cohen v. Cowles Media Co.*, 501 U.S. ___, 115 L.Ed.2d 586 (1991). There is nothing in *Waite I* nor in *Waite II* which would indicate that the state courts of Nebraska considered or decided any federal questions pertaining to Petitioner. In fact, as noted above, Petitioner's own pleading summarizing the issues on appeal to the Nebraska Court of Appeals in *Waite II* clearly does not ask the state court to address any federal issues [App. of Respondents 1-3].

A party to a state court action may not preserve a federal constitutional challenge for review by United States Supreme Court by generally invoking the Constitution in state court and awaiting review in the United States Supreme Court to specify the constitutional provision it is relying upon. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 100 L.Ed.2d 62 (1988). In order to colorably raise a cognizable claim under a federal statute or the federal constitution for review, at a minimum there should be no doubt from the record that a claim under a federal statute or the federal constitution was presented in a state court and that the state court was apprised of the nature or substance of the federal claim at the time and in the manner required by state law. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 100 L.Ed.2d 62 (1988).

It is not sufficient that a right under a specified provision of the Constitution is merely alleged in a pleading, if the federal question is not sufficiently real or substantial, or if the state court did not pass on the federal question presented in the pleading. *Sawyer v. Piper*, 189 U.S. 154, 47 L.Ed. 757 (1903); *Seaboard A.L. Railway v. Padgett*, 236 U.S. 668, 59 L.Ed 777 (1915); *Bowe v. Scott*, 233 U.S. 658, 58 L.Ed. 1141 (1915); *St. Louis and S.F.R. Co. v. Shepherd*, 240 U.S. 240, 60 L.Ed. 622 (1916). Furthermore, while the federal question need not be presented to a state court in any particular form, the United States Supreme Court is not required to review a case coming from a state court if the federal issues were not presented with sufficient clarity or definiteness to permit effective adjudication in the United States Supreme Court. *Socialists Labor Party v. Gilligan*, 406 U.S. 583, 32

L.Ed.2d 317 (1972); *Herndon v. Georgia*, 295 U.S. 441, 79 L.Ed. 1530 (1935).

As noted above, Petitioner makes much argument that he raised federal question issues in state court briefs. However, no such briefs have been included by Petitioner in his appendix to this Court. A contention that a federal question was raised in the state court cannot be sustained by reference to briefs and statements which are not part of the record transmitted to the United States Supreme Court. *Lynch v. New York*, 293 U.S. 52, 79 L.Ed. 191 (1934).

In order for a state court case to be reviewed by the United States Supreme Court, it must appear from the record that a federal question was decided by the state court, or that the judgment rendered could not have been given without deciding the federal question. *Harding v. Illinois*, 196 U.S. 78, 49 L.Ed. 394 (1904); *First National Bank of Esterville*, 215 U.S. 241, 54 L.Ed. 223 (1910). It is not sufficient that a federal question was raised or might have been decided by a state court. *Kansas Endowment Association v. Kansas*, 12 U.S. 103, 30 L.Ed. 593 (1987); the record must show expressly, *Id.* at ___, or by necessary implication, *Sayward v. Denny*, 158 U.S. 180, 39 L.Ed. 941 (1895); that a federal question was actually decided by the state courts adversely to the appellant or petitioner in the United States Supreme Court. Again, simply these requirements are clearly lacking here.

Merely for the sake of argument, even if Petitioner had raised a federal question below, the two underlying decisions found at *Waite I* and *Waite II* are based on sound state law that has no bearing on any federal issue. The United States Supreme Court has long held that it

will not consider an issue of federal law on direct review from a judgment of a state court if the state court's judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 2092 (1945); *Smith v. Smith*, 366 U.S. 210, 6 L.Ed.2d 233 (1961); *Bell v. Marland*, 378 U.S. 226, 12 L.Ed.2d 822 (1964); *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983).

Where a state court's decision rests upon an adequate and independent state ground, the state ground controls the result of the case, no matter what the Supreme Court may say about the merits of the federal issue. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed.2d 965 (1977). In such a case, anything which the United States Supreme Court could say on the federal issue would merely be an advisory opinion and the United States Supreme Court has stated that it does not have jurisdiction to render an advisory opinion under such circumstances, or to correct statements in the state court's opinions which do not affect the final outcome of the case, even though the state court's opinion may reflect an erroneous view of the federal law. *Herb v. Pitcairn*, 324 U.S. 117, 89 L.Ed 789 (1945); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 38 L.Ed 298 (1973); *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L.Ed 1188 (1956); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 2092 (1945). Accordingly, a writ of certiorari to review a state court decision will generally be dismissed and improvidently granted where the state court judgment rests on an adequate and independent state ground. *Zacchini v.*

Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L.Ed.2d 965 (1977).

II. RESPONDENTS OBJECT TO THE QUESTIONS RAISED BY PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI.

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, in addition to objecting to this Court's jurisdiction to accept Petitioner's request for certiorari due to Petitioner's failure to properly raise and preserve for review a federal question in the underlying state court proceedings, Respondents, so as to not waive any other objections to the Petition for Writ of Certiorari, hereby object to the questions presented by Petitioner in his Petition for Writ of Certiorari.

CONCLUSION

Respondents, W. Scott Carpenter, M.D., Scottsbluff Internal Medicine Group, Armando J. Mangana, M.D., William M. Packard, M.D., Terry Mark Himes, D.O. and Larry O'Holleran, M.D., pray that this Court deny Petitioner's Writ of Certiorari because the case presents no federal question for this Court to review and because the lower court's holdings were not in error.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE, Plaintiff, vs. W. SCOTT CARPENTER, M.D., REGIONAL WEST MEDICAL CENTER, SCOTTSBLUFF INTERNAL MEDICINE GROUP, Defendants.	)	NO. 38267 ISSUES ON APPEAL

COMES NOW, Plaintiff, Glenn R. Waite, individually, as the sole distributee and sole beneficiary of the estate of Harriet I. Waite pursuant to Rule 5(A)(2) of the Supreme Court / Court of Appeals Rules and provides a statement of issues which this appellant intends to present on appeal. The issues to be presented on appeal are as follows:

1. Nebraska law does not confer jurisdiction upon the trial judge to hold a hearing in chambers on the plaintiff's motion to vacate judgment or motion for new trial. Subject matter jurisdiction cannot be conferred upon judge by consent.

2. It was an abuse of discretion on the part of the trial court to first make a decision on his motion to vacate judgment or motion for new trial and not first decide on his motion for change of Judge or Venue.

3. It was an error for the trial court to hold that all matters raised by the various motions of the plaintiff

could have and should have been raised in the appeal taken to the Nebraska Court of Appeals.

4. It was an abuse of discretion on the part of the trial court to prevent the plaintiff from presenting evidence or his theory of defense and deny him a continuance in the matters presented in his motions to vacate a void judgment.

5. The issue of the alleged unauthorized practice of law by a personal representative of a decedent's estate presented by a motion for summary judgment presents a factual issue as to whether the representative is acting in a representative capacity. The factual issue goes to the status of the decedent's estate as to who the heirs are and how the estate will be distributed. During the time the probate court is administering the decedent's estate, the district court is not in possession of the decedent's estate and has no subject-matter jurisdiction to determine the status of the decedent's estate. Personal Representative who represents himself as the sole beneficiary is not acting in a representative capacity. Sole distributee may represent himself when estate descends to him, individually. Lawsuit dismissed against administrator is not a bar to sole distributee prosecuting lawsuit on same cause of action.

6. A judgment decided or rendered by a disqualified judge is absolutely void due to lack of subject-matter jurisdiction. Under Nebraska law there is no

implied waiver to the jurisdiction of the disqualified judge.

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Plaintiff
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing ISSUES ON APPEAL to be served upon James A. Snowden, 1000 NBC Center, Lincoln, NE 68508; and Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114 by regular U. S. Mail this the 2nd day of May 1994.

Glenn R. Waite